

## The Primacy of Society and the Failures of Law and Development

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# The Primacy of Society and the Failures of Law and Development

Brian Z. Tamanaha<sup>†</sup>

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Efforts at law and development have failed for decades. The underlying reasons for the failures have been understood just as long. Nevertheless, law and development initiatives are proliferating, carrying on with similarly unsuccessful projects and methods. Academic work on law and development over the course of this same period has traveled full circle, ending up where it began, even as the number of scholars engaged in the subject multiplies, issuing an outpouring of books and articles. Billions of dollars and the efforts of a multitude of dedicated individuals have been expended in pursuit of law and development. If the reasons underlying the persistent failures are not integrated into our understanding, law and development practitioners and scholars will be standing in much the same place a generation hence.

The oft-repeated circle can be quickly sketched. Following decolonization in the 1950s and 1960s, the initial development effort centered on economic and political development, with legal development incorporated as an integral aspect of both. The standard development formula, then known as “modernization,” called for enhancing four societal features: bureaucratic governmental apparatus, capitalist market systems, “generalized universalistic legal systems,” and democratic political systems.<sup>1</sup> At the time, many thought that this combination, as leading social theorist and proponent Talcott Parsons put it, “confers on its possessors an adaptive advantage far superior to the structural potential of

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1. Talcott Parsons, *Evolutionary Universals in Society*, 29 AM. SOC. REV. 339, 356 (1964).

societies lacking it.”<sup>2</sup> By the late 1960s, however, observers acknowledged that “the failure of this policy is now widely recognized—economic growth has been exceeded by growth of population, ruinously expensive capital projects have lost money and brought little benefit except to a few, corruption and privilege continue to spread among the new elites.”<sup>3</sup> Many explained the disappointing economic progress by pointing to the lack of “soci[al] value systems” essential to the development of capitalism (e.g., individualism, work ethic, delayed gratification) and to rapacious or unstable governments which inhibited economic activities.<sup>4</sup> Malfunctioning political systems, in turn, were similarly blamed on faulty political cultures, which were defined as “a set of attitudes, beliefs, and sentiments which give order and meaning to a political process and which provide the underlying assumptions and rules that govern behavior in the political system.”<sup>5</sup> Democracy was slow to take hold, theorists explained, because the populace and the elites did not share a “political culture” that values open communication, knowledgeable participation in the political decision making process, and respect for the public function of government.<sup>6</sup> By the end of the 1970s, development theory was in disarray and lacked either a leading model or clear ideas about what could be done to facilitate economic and political development.<sup>7</sup>

Legal development was seen as a concomitant aspect of economic and political development on the assumption that market regimes and government require legal backbones.<sup>8</sup> The requisite legal regime was modeled on Western legal systems, requiring uniformity and comprehensiveness, a monopoly on force, equal application of the law, rationality, rule-bound decision making, bureaucratic organization, an emphasis on rights and duties of individuals, and an instrumental view of law (to serve social needs identified by the polity) with the system run by

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2. *Id.* at 357.

3. J. P. Nettl & Karl von Vorys, *The Politics of Development*, 46 COMMENTARY 52, 54 (1968).

4. See J. P. Nettl & Roland Robertson, *Industrialization, Development or Modernization*, 17 BRIT. J. SOC. 274, 278 (1966). See generally POLITICAL CULTURE AND POLITICAL DEVELOPMENT (Lucian W. Pye & Sidney Verba eds., 1965). But see generally Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 LAW & SOC. REV. 723 (1980) (describing the dependency theory, which blames economic failure on the global economic system which favors the West at the Third World's expense).

5. Lucian W. Pye, *Political Culture*, in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 218, 218 (David L. Sills ed., 1968).

6. GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 13–15 (1963). See generally Gabriel A. Almond, *A Developmental Approach to Political Systems*, 17 WORLD POL. 183 (1965).

7. See Harry Eckstein, *The Idea of Political Development: From Dignity to Efficiency*, in POLITICAL SYSTEM AND CHANGE 311 (Ikuo Kabashima & Lynn T. White, III eds., 1986); see also Tony Smith, *Requiem or New Agenda for Third World Studies*, in POLITICAL SYSTEM AND CHANGE 347 (Ikuo Kabashima & Lynn T. White, III eds., 1986).

8. See Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11, 52–53 (1969) (describing these assumptions and then raising doubts).

legal professionals.<sup>9</sup> The “received wisdom of law and development” at the time held that “a more highly developed legal system leads to a more highly developed economy or polity.”<sup>10</sup> Additionally, lawyers touted law as uniquely suited for facilitating the development project because “[a] primary function of law may be to engineer the social and economic change necessary to achieve the goals of development.”<sup>11</sup> By this account, law would provide the legal infrastructure required for development, and law had the capacity to bring about the social, economic, and political changes (including requisite cultural attitudes) conducive to development.<sup>12</sup>

Law and development initiatives mainly took the form of transplanting Western legal institutions and codes into developing countries, and working to establish legal education and professional organizations based on Western models. These initiatives were quickly seen as a failure.<sup>13</sup> Elites would co-opt the law or undermine legal reforms that threatened to dilute their power, corruption was endemic among legal officials, legal institutions were dysfunctional, and legal codes amounted to little more than words on paper<sup>14</sup>. Parallel to prevailing accounts of disappointing economic and political development, a leading explanation in the legal context pointed to the lack of a supportive “legal culture”—“habits of obedience to law, and respect for law.”<sup>15</sup> An early participant in law and development formulated “the law of non-transferability of law.”<sup>16</sup> “A particular law in two places with different social, political, economic and other circumstances can . . . only by coincidence induce similar behavior in both places.”<sup>17</sup>

All of the above was noted in the 1960s and 1970s, reflecting broad recognition that efforts at building or reproducing capitalism, democracy, and liberal legal systems had met with little success. Meanwhile, against the grain of this broad pessimism, extraordinary economic and political changes have taken place in many countries since the 1960s. Immense economic strides were made in a few decades by the Asian tigers (Hong Kong, Singapore, South Korea, and Taiwan), then later by China and India,

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9. See generally Marc Galanter, *The Modernization of Law*, in *MODERNIZATION*, (Myron Weiner ed., 1966).

10. Friedman, *supra* note 8, at 58.

11. Robert A. Sedler, *Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System*, 13 ST. LOUIS U. L.J. 195, 199 (1968).

12. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).

13. See *id.*

14. See Lawrence M. Friedman, *Legal Culture and Social Development*, 4 LAW & SOC. REV. 29 (1969); Robert B. Seidman, *Law and Development: A General Model*, 6 LAW & SOC. REV. 311, 328 (1972).

15. Friedman, *supra* note 8, at 61; see also Friedman, *supra* note 14, at 29.

16. ROBERT B. SEIDMAN, *THE STATE, LAW, AND DEVELOPMENT* 34 (1978).

17. *Id.* at 35-36.

among others.<sup>18</sup> A wave of democratization around the world began in the mid-1970s—ironically, not long after political scientists explained that many countries lacked the civic culture essential to democracy.<sup>19</sup> Only 41 of 150 existing states in the world were democratic in 1974; now three-fifths of nation-states are democratic.<sup>20</sup> The late twentieth century ushered in a “global diffusion of markets and democracy.”<sup>21</sup>

These successes, however, have been tempered by a broader sense that things have generally not gone well.<sup>22</sup> One billion people remain mired in abject poverty, with another billion perched just above them on the economic scale.<sup>23</sup> Much of Africa and large parts of Central Asia have stagnated, or gone backwards, and progress in Latin America has been uneven and halting.<sup>24</sup> The crisis of the late 1990s exposed the fragility of the booming Asian economies, while the Western-encouraged swift transition of post-communist countries to privatization and unfettered market capitalism produced poor results. The picture for democracy is also mixed, with a substantial group of countries—including powers like China and Russia—showing little movement toward democratization.<sup>25</sup> Furthermore, several newly minted democracies appear precarious; some are illiberal or controlled by blocks within society,<sup>26</sup> while several others continue to suffer from significant “violations of human rights, massive corruption, and a weak rule of law.”<sup>27</sup>

Contemporary specialists in economic and political development acknowledge the enormity of the hurdles. The collapse of the once-confident “Washington Consensus” and the financial crisis in Western economies that unfolded in 2007-08 have shaken the confidence of economic theorists. Development economists admit that they have no reliable knowledge about how to generate economic development.<sup>28</sup> Successful projects in one context do not necessarily work in another. Recent writing on economic and political development has once again

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18. Iqbal Z. Qadir, *Yes. China and India are Already Making Rapid Strides*, WHAT MATTERS, July 2009, [http://whatmatters.mckinseydigital.com/the\\_debate\\_zone/will-asia-become-the-center-for-innovation-in-the-21st-century?pg=7#ab](http://whatmatters.mckinseydigital.com/the_debate_zone/will-asia-become-the-center-for-innovation-in-the-21st-century?pg=7#ab).

19. See Samuel P. Huntington, *Political Development and Political Decay*, 17 WORLD POL. 386 (1965).

20. Larry Diamond, *Universal Democracy?*, POL’Y REV., June 2003, at 3-25, available at <http://www.hoover.org/publications/policy-review/article/8078>.

21. THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY (Beth A. Simmons, Frank Dobbin & Geoffrey Garrett eds., 2008).

22. See WILLIAM EASTERLY, *THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006); see generally JEFFRY A. FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* (2006).

23. PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 3-5 (2007).

24. See *id.*

25. FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 91 (2003).

26. See *id.* at 17-21.

27. See generally Diamond, *supra* note 20.

28. See Jessica Cohen & William Easterly, *Introduction: Thinking Big Versus Thinking Small*, in *WHAT WORKS IN DEVELOPMENT? THINKING BIG AND THINKING SMALL* (Jessica Cohen & William Easterly eds., 2009).

arrived at the position that “culture matters.”<sup>29</sup> According to a prominent development economist, “[i]f we learn anything from the history of economic development, it is that culture makes almost all the difference.”<sup>30</sup> Economic development thrives in cultures that value “thrift, investment, hard work, education, organization, and discipline.”<sup>31</sup> Contemporary political scientists likewise conclude that societies without an ethos of broad participation and deliberation—especially those with culturally established inequalities, hierarchy, and rigid obedience to authority—suffer from stunted democracy or no democracy.<sup>32</sup>

Contemporary law and development is in a similar funk and has taken the same turn. As Part I will elaborate, “a strong current of disappointment” runs through the law and development literature.<sup>33</sup> The standard “rule of law and development” formula involves drafting legal codes; training legal officials (police, prosecutors, and judges); solidifying law schools and the legal profession; and enhancing legal access for citizens.<sup>34</sup> These legal reforms have not taken hold. Corruption and dysfunction continues to plague legal institutions, many transplanted codes lie unused, and substantial proportions of the populace are not served by the legal system. People engaged in law and development projects admit that they do not have a good idea of what works; they also recognize that success in one context does not necessarily mean success in another. Lately, practitioners and scholars have begun to emphasize the lack of an appropriate legal culture: “The rule of law is not something that exists ‘beyond culture’ and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes.”<sup>35</sup> In its substantive sense, the rule of law is a culture[.]”<sup>36</sup> The solution, they assert, is to implement programs that inculcate values in the citizenry supportive of the rule of law—mainly, respect for the law.<sup>37</sup>

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29. CULTURE MATTERS: HOW HUMAN VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Harrington eds., 2000).

30. David Landes, *Culture Makes Almost All the Difference*, in CULTURE MATTERS: HOW HUMAN VALUES SHAPE HUMAN PROGRESS 2 (Lawrence E. Harrison & Samuel P. Harrington eds., 2000).

31. Samuel P. Huntington, *Cultures Count*, in CULTURE MATTERS: HOW HUMAN VALUES SHAPE HUMAN PROGRESS xiii (Lawrence E. Harrison & Samuel P. Harrington eds., 2000).

32. See Fernando Calderón & Alicia Szmukler, *Political Culture and Development*, in CULTURE AND PUBLIC ACTION 281 (Vijayendra Rao & Michael Walton eds., 2004); Anita Abraham & Jean-Philippe Platteau, *Participatory Development: Where Culture Creeps In*, in CULTURE AND PUBLIC ACTION 210 (Vijayendra Rao & Michael Walton eds., 2004).

33. Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383, 384 (2002).

34. See THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 168 (1999).

35. See Amy J. Cohen, *Thinking With Culture in Law and Development*, 57 BUFF. L. REV. 511 (2009) (describing and raising questions about the recent turn to culture).

36. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2285 (2003).

37. See generally Lan Cao, *Culture Change*, 47 VA. J. INT’L. L. 357 (2007).

Thus, we have come full circle. The diagnosis is correct—though incomplete—that cultural attitudes toward law are important. To propose that the solution is to target reform efforts at culture, however, is more of the same refusal to learn. Such efforts will not work as intended. The problems are not just that culture is a fuzzy, all-encompassing notion, or that we have no idea how to mold culture to our desires, or that culture changes incrementally, or even that the very project—deliberately inculcating values in other societies—has imperialistic overtones. The bigger problem is that a causal arrow does not run singly from culture to institutions. Culture and institutions (as recognized decades ago)<sup>38</sup> are mutually constitutive: to operate effectively, legal systems require respect and support from the populace, but to secure this respect and support, the legal system must serve the needs of the populace. Neither side of this relation exists without the other—and the answer to this chicken and egg problem is that *both* come first, or at the same time, growing together.

This conundrum, although tough, is not the main reason why targeting cultural attitudes about law will not solve law and development failures. The more fundamental problem is that factors that influence law extend far beyond law itself. Legal institutions and cultural attitudes toward law exist inseparably within a broader milieu that includes the history, tradition, and culture of a society; its political and economic system; the distribution of wealth and power; the degree of industrialization; the ethnic, language, and religious make-up of the society (the presence of group tension); the level of education of the populace; the extent of urbanization; and the geo-political surroundings (hostile or unstable neighbors)—everything about a particular society matters. Power dynamics among the elite within a society are particularly influential in shaping the operation of law,<sup>39</sup> which, in turn, affects how the populace regards the law. For convenience, I call this the “connectedness of law principle,” to convey that the law is connected to every aspect of society. Reforms targeted at law will unavoidably impinge upon, and be affected by, the enveloping fabric of society, frequently in unanticipated ways. The theoretical ambition of this Article, independent of law and development, is to expose aspects of the relationship between law and society that are usually hidden from view.

A crucial revelation lies in the parallel fates of the economic, political, and legal development efforts described above—each breaks apart on the shoals of societies that do not possess the same cultural underpinnings, institutional alignments, and power dynamics. These respective development programs—capitalism, democracy, liberal legalism—are extracted from institutional arrangements that co-evolved in an integrated

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38. See John Street, *Review Article: Political Culture—From Civic Culture to Mass Culture*, 24 BRIT. J. POL. SCI. 95, 97-102 (1994) (describing this realization in the 1960s).

39. The overarching influence of elite dynamics on the development of the legal order is the central theme of DOUGLASS C. NORTH, JOHN J. WALLIS & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* (2009).

fashion within Western societies. Because the avowed objective in the 1960s and 1970s was to transform developing countries to fit the Western model, modernization theory readily acknowledged this: "[T]he typical condition of modernity pertains to the social, political and economic characteristics of Western liberal democracies."<sup>40</sup> After modernization theory was excoriated for being ethnocentric, as well as conceptually and empirically unsound, this theory was driven underground.<sup>41</sup> Since then, by all accounts, the theory has remained safely interred in the graveyard of discredited ideas.<sup>42</sup>

However, there is little discernable difference between those supposedly abandoned ideas, and contemporary ideas and approaches to development. What helps disguise this resurrection is that the elements are not bundled together as tightly as before—capitalism is now promoted separately as essential to wealth creation; democracy is championed as the touchstone of a free and peaceful society; the rule of law is said to be essential for economic development and limiting government tyranny; and human rights are claimed to be universal.<sup>43</sup> When seen together, however, there is no mistaking it—this is modernization theory redux. This includes its attendant assumptions (now implicitly maintained) that this collective political, economic, and legal arrangement is the best available and represents the future trajectory of societies around the world, at least for societies that hope to thrive. Reality on the ground belied modernization theory decades ago. The same realities are revealed again today for the plain reason that economic, political, and legal institutional arrangements taken from one society do not work the same way in another society with different arrangements and underpinnings.

The prospects are worse for law and development than for other elements of the modernization package. The past thirty years have demonstrated that components of capitalism (introducing market mechanisms, securing financing, establishing factories and production chains) and democracy (instituting periodic elections) can be implemented through the creation of new institutional arrangements that function effectively—although they will not work the same or have the same consequences as in the West. Legal institutions, however, are relatively more dependent upon and subject to history and surrounding social forces.

Recent geo-political events have moved law and development from the margins to center stage. President Barack Obama's "2010 State of the Union Address" linked the fight against terrorism and the war in Afghanistan to the success of law and development initiatives:

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40. Nettl & Robertson, *supra* note 4, at 281.

41. See Francis G. Snyder, *The Failure of "Law and Development,"* 1982 WIS. L. REV. 373, 373 (1982) (reviewing JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980))

42. See *id.* at 373-74.

43. See Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls?: Problems and Prospects of US-Sponsored "Rule of Law" Reform Projects in the People's Republic of China* 5-12 (Harvard Univ. Ctr. for Int'l. Dev., Working Paper No. 47, 2000).



And in Afghanistan, we're increasing our troops and training Afghan security forces so they can begin to take the lead in July of 2011, and our troops can begin to come home. We will reward good governance, work to reduce corruption, and support the rights of all Afghans—men and women alike.<sup>44</sup>

For the reasons laid out in this Article, if this is indeed the U.S. strategy, it is unwise. It cannot succeed in the short term and it is highly unlikely to succeed in the long term.

This is not a counsel of despair. Underneath the gloomy pessimism that pervades law and development, legal development is taking place. A central theme of this Article is that it is crucial to mark the distinction between “law and development” activities—the modernization project—and “legal development”—the ongoing construction of legal institutions that occurs in all societies. It is easy to conflate the two because they sound the same, but they are not. The failure of law and development efforts does not mean that legal development is not taking place. It means that the projects are not working and it tells us that imprudent application of the standard law and development template is a mistake. A better way forward is to think about how legal development usually takes place—that is, finding viable solutions in particular contexts to pressing economic, political, and social problems.

The argument will proceed in successive layers designed to gradually draw out both why and how “law and development” is different from “legal development.” Part I describes the current state of law and development. Part II explains why it is misleading to see law and development as a “field.” Part III shows how the connectedness of law undermines legal reform efforts. Parts IV and V examine the two main streams of contemporary law and development, what I call, respectively, “law and capitalism” and the “progressive development package.” Part VI elaborates on how law and development projects are designed and carried out by lawyers in a fashion that invites failure because they ignore the connectedness of law. Part VII shows how the ideas that inform the two streams of law and development harbor potentially harmful unanticipated consequences when transplanted into societies with different underpinnings. Part VIII illustrates the point that law and development is not the same as legal development. Part IX concludes the Article by suggesting a better way to think about these projects going forward.

## I. The Current State of Law and Development

Law and development efforts have now spanned more than half a century. The labels have changed over time: in the fifties, sixties, and seventies it was called the “law and development movement”;<sup>45</sup> in the eighties and

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44. Barack H. Obama, President of the U.S., State of the Union Address (Jan. 27, 2010) (available at [http://www.huffingtonpost.com/2010/01/27/state-of-the-union-2010-full-text-transcript\\_n\\_439459.html](http://www.huffingtonpost.com/2010/01/27/state-of-the-union-2010-full-text-transcript_n_439459.html)).

45. See Trubek & Galanter, *supra* note 12.

nineties, through the turn of the century, it morphed from “good governance programs” to “rule of law and development.”<sup>46</sup> In the first few decades, modest financial support was supplied by a few aid agencies and foundations; in the nineties, the funding spigot burst open, with financial support coming from a multitude of organizations that cumulatively amounted to several billion dollars.<sup>47</sup>

This effort has involved an untold number of projects around the world, focusing on enhancing legal education; implementing judicial reform; constitution or code drafting; transplanting laws and institutions; law enforcement training; combating corruption; educating lay people about the law; providing access to the law for the poor; and supplying material assistance for legal institution building (including basics like office supplies, computers, and legal materials). There are innumerable project reports, local studies, national or transnational studies, and comparative studies, running the gamut from project assessments, to historical accounts, to statistical studies, to broad overviews.

Law and development work is funded or carried out by major international and national institutions, both public and private, which prominently include the World Bank, the Ford Foundation, the Carnegie Endowment for International Peace, the American Bar Association, the UN Development Program (UNDP), the U.S. Agency for International Development (USAID), the Inter-American Development Bank, the European Bank for Reconstruction and Development, the United Kingdom’s Department for International Development, the Asian Development Bank, the Japan International Cooperation Agency, and many more.<sup>48</sup>

What are the fruits of this lengthy and costly effort? There are two distinct aspects to this question. The first aspect looks at how much law and development has accomplished on the ground. The second aspect focuses on the body of knowledge accumulated about what works in law and development.

An honest evaluation compels an unhappy conclusion on both aspects. By most accounts, the actual improvements in law realized from these efforts have been meager. Thomas Carothers, director of the rule of law project for the Carnegie Foundation, offers this assessment:

The effects of this burgeoning rule-of-law aid are generally positive, though usually modest. After more than ten years and hundreds of millions of dollars of aid, many judicial systems in Latin America still function poorly. Russia is probably the single largest recipient of such aid, but is not even clearly moving in the right direction. The numerous rule-of-law programs carried out in Cambodia after the 1993 elections failed to create values or structures strong enough to prevent last year’s coup. Aid providers

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46. See Stephenson, *supra* note 43.

47. See Alvaro Santos, *The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 253 (David. M. Trubek & Alvaro Santos eds., 2006) (pegging the World Bank’s contribution alone at \$3.8 billion).

48. See, e.g., *About Us*, THE FORD FOUNDATION, <http://www.fordfoundation.org/about-us/programs> (last visited Feb. 4, 2011).

have helped rewrite laws around the globe, but they have discovered that the mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement. . . .

Efforts to strengthen basic legal institutions have proven slow and difficult. Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor impact.<sup>49</sup>

Matters are worse than this passage lets on, unfortunately, because Carothers omits the most disheartening failure.<sup>50</sup> During the same period, in excess of one hundred million dollars was spent in Africa on law and development, with results that have been characterized as “pretty depressing.”<sup>51</sup>

Carothers also offers a bracing assessment of the current state of knowledge. A long-time participant confided in him that “we know how to do a lot of things, but deep down we don’t really know what we are doing.”<sup>52</sup> Work in this field operates

from a disturbingly thin base of knowledge at every level—with respect to the core rationale of the work, the question of where the essence of the rule of law actually resides in different societies, how change in the rule of law occurs, and what the real effects are of changes that are produced. The lessons learned to date have for the most part not been impressive and often do not actually seem to be learned.<sup>53</sup>

Carothers’ discouraging estimation of the fruits of law and development efforts appears to be widely shared among those who engage in this work. A review of three recent notable books on law and development observed:

Although the contributions to these volumes reflect decades of both practical experience with and scholarly reflection upon legal reforms in developing countries, at the end of the day they are remarkably inconclusive. None of the authors represented in these volumes seem strongly optimistic about whether legal reforms are likely to promote development (at least early in the development trajectory).<sup>54</sup>

The most an optimist can say is that it is premature to draw overly pessimistic conclusions.<sup>55</sup> It “will take many years or even decades before it becomes clear whether and to what extent sustained impact

49. Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 3, 11-12 (Thomas Carothers ed., 2006).

50. A catalogue of the widespread and persistent failures is Stephen Golub, *A House Without a Foundation*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 105 (Thomas Carothers ed., 2006).

51. Laure-Hélène Piron, *Time to Learn, Time to Act in Africa*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 275, 289 (Thomas Carothers ed., 2006).

52. Thomas Carothers, *The Problem of Knowledge*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 15, 15 (Thomas Carothers ed., 2006).

53. *Id.* at 27.

54. Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists Versus Skeptics*, 56 *AM. J. COMP. L.* 895, 897 (2008).

55. See Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 *AM. J. INT’L. L.* 470, 473, 484 (1995).

transpires.”<sup>56</sup>

One clear lesson shines through the haze: society is the all-consuming center of gravity of law and development. The term “society” is used here in a capacious sense—encompassing the totality of history, culture, human and material resources, religious and ethnic composition, demographics, knowledge, economic conditions, and politics. No aspect of law or development operates in or can be understood in isolation from these surrounding factors. The qualities, character, and consequences of law are thoroughly and inescapably influenced by the surrounding society. There can be no standard formula for law because every legal context in every society involves a unique constellation of forces and factors. A good law in one location may have ill effects or be dysfunctional elsewhere.

Law and development practitioners and scholars recognize this fundamental truth. “Context matters,” “local conditions are crucial,” “circumstances on the ground shape how things work”—this insight has been repeated so often it is nearly a cliché.<sup>57</sup> What stymies law and development projects time and again is the “the extreme interrelatedness of everything with everything else in a society.”<sup>58</sup> This is the connectedness of law principle.<sup>59</sup> The proposition that law is interconnected with everything in society applies with full force to *all* legal systems. This is *the* fundamental insight of law and society research.<sup>60</sup> Two and a half centuries ago, Montesquieu observed that law is so intimately tied to society that “it is very unlikely that the laws of one nation can suit another.”<sup>61</sup> Elaborating upon Montesquieu’s view, the pioneering legal sociologist Eugen Ehrlich remarked in 1916 that “law is a component of social life along with the other ‘things governing men’ and that each of them determines the others . . . . [T]he interdependence of all the elements of social life is assumed.”<sup>62</sup>

Because it is impossible to know or consider everything, one might be tempted to give up in despair. Law and development practitioners have plowed ahead anyway, using general templates on transplanting legal codes, bolstering courts, training lawyers, and hoping for the best.

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56. Golub, *supra* note 50, at 125.

57. An article that focuses on the failure to recognize this insight is Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327 (2002); see also Stephen J. Troope, *Legal and Judicial Reform through Development Assistance: Some Lessons*, 48 MCGILL L.J. 357, 387–390 (2003).

58. David M. Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 153 (David M. Trubek & Alvaro Santos eds., 2006) (Kennedy uses this phrase in connection with policy making, but it perfectly fits law as well).

59. An outline of the thick social milieu which law operates in can be found in BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 213–221 (2001).

60. See Friedman, *supra* note 8.

61. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Cambridge Univ. Press 1989) (1748).

62. Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582, 586 (1916).

## II. Why “Law and Development” is Better Not Seen as a Field

Many who write on law and development appear to consider it a “field.” “With a recognizable set of activities that make up the rule-of-law assistance domain,” Carothers writes, “rule-of-law assistance has taken on the character of a coherent field of aid.”<sup>63</sup> Conceiving of law and development as a field, I will argue, is a conceptual mistake that perpetuates confusion. The multitude of countries around the world targeted for law and development projects differ radically from one another. No uniquely unifying basis exists upon which to construct a “field”; there is no way to draw conceptual boundaries to delimit it. Law and development work is more aptly described as an agglomeration of projects advanced by motivated actors and supported by external funding. Law and development activities are driven and shaped by the flow of money that supports it and by the agendas of the people who secure this funding.<sup>64</sup> This is offered as an accurate description, not a cynical characterization. A quick glance at a few countries in which law and development projects are being done will help make the point.

Russia is an industrialized country run by a semi-authoritarian polity, with a formidable military, struggling to make the transition from decades of communism to global capitalism. Russia’s economy collapsed after the transition and has grown unevenly since.<sup>65</sup> It enjoys ample natural resources, including significant natural gas reserves. It has a well-educated populace, a cadre of ultra-rich, a notable organized crime presence, and a police force plagued by corruption.<sup>66</sup> It covers a huge territorial expanse reaching from Eastern Europe to the Pacific, encompassing large sub-populations of ethnic groups with different religions, cultures, and languages.<sup>67</sup>

Pakistan is a populous Islamic nation in the mountainous region of Central Asia, with teeming modern cities bustling with economic activity, as well as vast rural stretches where people live in conditions hardly different from those of centuries past.<sup>68</sup> The military is independent from the executive branch of government and has a strong presence in the management of domestic affairs. Since separating from India as an Islamic nation in 1956, the reins of government have shifted back and forth between democratic elections and military coups. In recent years, Pakistan’s manufacturing for export and service sectors has grown at an enviable pace,

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63. Carothers, *supra* note 52, at 28.

64. *Id.*

65. For an overview of Russia’s economic situation see EASTERLY, *supra* note 22, at 61-75.

66. Theodore P. Gerber & Sarah E. Mendelson, *Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?*, 42 LAW & SOC’Y REV. 1, 12, 16-18 (2008); Ethan S. Burger, *Corruption in the Russian Arbitrazh Courts: Will There Be Significant Progress in the Near Term?*, 38 INT’L LAW. 15, 19 (2004).

67. See generally DAVID C. LEWIS, *AFTER ATHEISM: RELIGION AND ETHNICITY IN RUSSIA AND CENTRAL ASIA* (2000).

68. See Talat Anwar, Sarfraz K. Qureshi & Hammad Ali, *Landlessness and Rural Poverty in Pakistan*, 43 PAK. DEV. REV. 855 (2004).

although with intermittent severe setbacks.<sup>69</sup> The legal profession and courts are well established in the cities, but state courts in rural areas are negligible, corrupt, suffer long delays, and there are few lawyers to serve the rural population. The Taliban controls certain regions of the country outside the cities, where they impose a harsh brand of Sharia law.<sup>70</sup>

Many nations in sub-Saharan Africa have weak or failed states; little industrial development or manufacturing; unreliable electrification; an inadequate infrastructure of communication, transportation, and sewerage; miserable education systems; and poor public health (including a devastating AIDS epidemic). A substantial proportion of the population lives in impoverished agricultural regions. Government jobs are the main source of employment. Many African countries have relatively few trained lawyers and judges. For example, with a population of 7.5 million, Rwanda is served by about fifty lawyers, twenty prosecutors, and fifty newly recruited judges.<sup>71</sup> Malawi has 300 lawyers for 9 million people.<sup>72</sup> African nations, many with relatively small populations (under 20 million), inherited a colonial legacy that combines an uneasy mix of rival tribal or ethnic groups, along with descendants of white settlers and other immigrants. Tension among groups occasionally erupts into violence, as in the case of Rwanda in the mid-1990s, where violence occurred on a horrific scale between the Tutsis and Hutus.<sup>73</sup> African countries have been plagued by recurrent civil wars and coups that reflect underlying tribal or ethnic rivalries. Several countries have rich reserves of natural resources controlled by government heads or by oligarchic firms with close ties to the government.<sup>74</sup> Autocratic rule is common, with rulers dedicated to maintaining power, siphoning off wealth, and rewarding supporters.

Russia, Pakistan, and Rwanda have certain aspects in common—if observed from a mile-high vantage point that renders all details invisible. But what do Russia, Pakistan, and Rwanda have in common with Argentina, Bolivia, Chile, China, Costa Rica, Ecuador, Egypt, El Salvador, Honduras, Malawi, Morocco, Paraguay, the Philippines, and Romania? All of these countries are addressed in some detail in Carothers' book on the rule of law and development.<sup>75</sup> Also mentioned in the book are Bangladesh, Bulgaria, Cambodia, Indonesia, Kenya, Peru, Romania, South Africa, Venezuela, and Vietnam, and the list goes on. These countries differ from one another in virtually every respect: population, natural resources, history,

69. See *Real GDP*, FED. BUREAU OF STAT., [http://www.sbp.org.pk/ecodata/GDP\\_table.pdf](http://www.sbp.org.pk/ecodata/GDP_table.pdf).

70. See Pamela Constable, *Taliban-Style Justice Stirs Growing Anger*, WASH. POST (May 10, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/09/AR2009050902518.html>.

71. Piron, *supra* note 51, at 282.

72. *Id.* at 291.

73. Report of the Independent Inquiry into the Actions of the United Nations During the 1994 genocide in Rwanda, transmitted by letter dated Dec. 15, 1999 from the Secretary-General addressed to the President of the Security Council, ¶ 1, U.N. Doc. S/1999/1257 (Dec. 15, 1999).

74. EASTERLY, *supra* note 22, at 125–26.

75. See CAROTHERS, *supra* note 52.

culture, mix of religions and ethnic groups, political system, degree of industrialization, agricultural production, competitive position in global trade, extent of urbanization, per capital income, proportion of middle class, number of lawyers, compensation and status of judges—to name a few. The only obvious trait these varied countries share is that they have been on the receiving end of law and development projects or research.

No advanced capitalist country—Anglo-America, Western Europe, Japan, and more recently Korea and Taiwan—is on the law and development list. Eligibility for law and development is defined in negative terms: any country not admitted to the advanced capitalist club is a candidate. This solely negative criterion deprives “law and development” countries of shared qualities upon which to build insights. The connectedness of law in society exacerbates this lack of a common core by making it hazardous to extrapolate experiences from one situation to the next. The success or failure of a judicial reform project in Russia will have little bearing on the same project in Rwanda or the isolated hills and valleys of Pakistan.

### III. How the Connectedness of Law Bedevils Judicial Reform Efforts

Because judicial institutions occupy a pivotal position in legal systems, corrupt or dysfunctional courts can debilitate the entire legal system. Lacking force of arms and unable to fund their own operations, courts usually are weak by comparison to other governmental institutions, particularly in developmental contexts.<sup>76</sup> For these reasons, and because judicial training is a relatively easy exercise, judicial reform is a favorite target of law and development efforts. A closer look at the reasons underlying the failures of these efforts helps illustrate the broader lack of success in legal reforms.

Reform does not work if it focuses solely on courts in isolation. A group of legal practitioners is needed to handle criminal and civil cases and to help develop legal practices and shared legal knowledge. Legal material must be available to legal officials. Clerks and transcribers are necessary to process and record proceedings. Judicial compensation must be set at levels sufficient to attract qualified individuals and to lessen the temptation to supplement pay through corruption. Judges must resist the influence of prejudices, class or group loyalties, the calls of friendship or extended networks of relations, and other improper incentives. Judges must have job security and personal security. They must not be subject to intimidation or threats from warlords, drug lords, organized crime, terrorists, or other dangerous elements, including other government officials. Political leaders, military leaders, the economic elite, the police, and government officials must generally abide by judicial rulings, including rulings that go against their interests or frustrate their desired objectives. The public must generally comply with judicial rulings and judicial orders

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76. See, e.g., Steven L. Taylor, *Democratization in Latin America*, 37 *LATIN AM. RES. REV.* 162, 172 (2002) (describing a consensus that judiciaries are the weakest pillars of Latin American democracies).

must be backed by effective sanctions when compliance is not forthcoming.

This basic list of the conditions necessary for a functioning state judicial system exposes the daunting scope of the task. Each aspect is contingent upon other factors that reach into realms beyond law itself. No single piece works in isolation. The idealized model of well functioning legal institutions assumes that a host of (invisible) secondary supportive conditions are also in place, involving a confluence of social, economic, cultural, and political factors.

An essential component of the rule of law is a prevailing ethic of voluntary compliance with the law and with legal rulings by judges among government officials and citizens. Respect for law and judges, however, will not take hold among citizens when judges are distrusted or avoided; perceived as corrupt; identified with the elite; seen as puppets of the regime; believed to favor one group at the expense of others; or when the populace is alienated from the law because it is stained by a colonial or authoritarian past or present or is written in a language they do not understand or was transplanted from elsewhere and is considered obscure or alien. Respect for law will also lag when judges are seen as simply inept or the judicial system is prohibitively expensive or suffers from long delays or other inefficiencies. One or more of these conditions are commonly found in developing countries.

When several of these conditions prevail, state courts end up ineffective, marginalized, and ignored, feared or despised by citizens. A prominent political scientist who has studied the region for decades observed, "Across most of Latin America, the judiciary is too distant, cumbersome, expensive, and slow for the poor and vulnerable even to attempt to access it. And if they do manage to obtain judicial access, the available evidence often points to severe and systematic discrimination."<sup>77</sup> Reforms in Brazil were implemented to grant judges substantial independence, including protections against removal, guaranteed salaries, control over staffing, discipline, and their budget. Observers found that the "sweeping increases in the autonomy of the judiciary led to rampant nepotism and other opportunities for corruption."<sup>78</sup> The judiciary came to be seen as a "privileged enclave," widely scorned by the public.<sup>79</sup> In parts of Eastern Europe judges have exploited institutional protections of judicial independence to shelter incompetence and corruption.<sup>80</sup> Judges in a number of countries across East Asia are perceived as biased (partial to the state) or corrupt. In

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77. Guillermo A. O'Donnell, *Why the Rule of Law Matters*, 15 J. DEMOCRACY 32, 40-41 (2004).

78. Michael Dodson, *Assessing Judicial Reform in Latin America*, 37 LATIN AM. RES. REV. 200, 215 (2002).

79. *Id.*

80. Venelin I. Ganey, *The Rule of Law as an Institutional Wager: Constitutions, Courts and Transformative Social Dynamics in Eastern Europe*, 1 HAGUE J. RULE L. 263, 272-73 (2009).



Indonesia, where polls show low levels of respect for courts,<sup>81</sup> people take the majority of their disputes to informal community mechanisms or religious leaders.<sup>82</sup> Similarly, more “than 80 to 90 percent of day-to-day disputes in Africa are said to be resolved through nonstate systems such as traditional authorities . . . .”<sup>83</sup> The UK Department for International Development estimates that “in many developing countries traditional or customary legal systems account for 80% of total cases.”<sup>84</sup> That might well be a low estimate.<sup>85</sup> Citizens are less likely to resort to state legal systems when they do not identify with the norms or orientation of the legal system; or are deterred by expense, distance, inefficiency, or corruption. Traditional or customary fora typically draw upon local rather than state law norms to resolve disputes and often strive to reach consensual outcomes.<sup>86</sup>

A study of failed judicial reform efforts across Latin America concluded, “[i]n sum, good judging can only be expected when all elements of the justice system are reformed, when civil society actively supports reform, and when the political culture places a high value on a reformed judiciary.”<sup>87</sup> Legal institutions require social stability, sufficient economic resources, favorable cultural attitudes toward law, and political stability.

These factors cluster together in a mutually supportive fashion in well-functioning situations—although each combination is unique and an infinite variety of possible combinations can function positively. The absence of a supportive cluster magnifies the difficulty of the task, since it is enormously difficult to bring the full complement of supportive strands on line. This is the connectedness of law principle in action. The tenacious paradox mentioned at the beginning of this article constitutes a kind of structural trap that bedevils reform efforts. Dysfunctional, oppressive, or unfair legal systems breed popular distrust and contempt for the law. This, in turn, contributes to the incapacity of the legal system, which further generates fear, avoidance, or disregard of the law. The trap can be avoided if courts consistently function over time in ways that meet the needs of citizens, but negative cultural attitudes toward law and judges are slow to change.

Although the focus of this discussion is on judicial reforms, the same points apply to all kinds of legal reform. Consider this summary of the failed reform of economic laws following the collapse of communism: “[i]n

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81. See Daniel Fitzpatrick, *Disputes and Pluralism in Modern Indonesian Land Law*, 22 YALE J. INT'L L. 171, 204 (1997). For a superb account of systemic judicial corruption in Indonesia, see SEBASTIAAN POMPE, *THE INDONESIAN SUPREME COURT: A STUDY OF INSTITUTIONAL COLLAPSE* (2005).

82. See MARIA DAKOLIAS, *METHODS FOR MONITORING AND EVALUATING THE RULE OF LAW* 22 (2005), available at [http://www.cilc.nl/Conference\\_publication\\_2005.pdf](http://www.cilc.nl/Conference_publication_2005.pdf).

83. Piron, *supra* note 51, at 291.

84. Golub, *supra* note 50, at 118.

85. An estimate offered by one World Bank unit is 90%. See World Bank Indon. Soc. Dev. Unit, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia* 3 (May 2008).

86. See TAMANAHA, *supra* note 59, at 112-120.

87. Dodson, *supra* note 78, at 202 (2002).

Eastern Europe, chief recipients of foreign aid were the Big Six accounting firms in the West, who drafted new laws for Eastern Europe and trained thousands of locals in Western law. Eastern European legislatures passed the Western-drafted laws, satisfying aid conditions for the West, but the new laws on paper had little effect on actual rules of conduct.<sup>88</sup> Legal reforms of this sort—particularly wholesale legal transplantation—fail because they are not adapted to prevailing legal and economic circumstances and cultures, they are grafted onto legal systems that suffer from a host of systemic problems, or they lack sufficient resources and local stakeholders committed to the success of the law.<sup>89</sup>

Again, this is not a fatalistic view. Legal development has occurred by a variety of different pathways, from organic growth to imposed or voluntary transplantation. Furthermore, there is no single or standard arrangement for a functioning legal system that meets the needs of its citizenry. “The one ‘precondition’ that seems to exist in almost all cases is indigenous demand for legal and judicial reform, be it driven by an elite (the common pattern) or by broad popular sentiment.”<sup>90</sup> Certain parts of the system can function while others fail. Constitutional courts across Eastern Europe, for example, have successfully established constitutional limits on government that are respected by political actors, while at the same time, lower courts in these same countries are gripped by pervasive corruption.<sup>91</sup>

#### IV. Law and Capitalism

The main stream of law and development in the past two decades has been justified in terms of economic development. The bulk of the funding for law and development activities is provided by institutions, like the World Bank, whose primary mission is to advance economic development.<sup>92</sup> The development of law is promoted as a *means* to achieve the economic development *end*. The standard package includes laws on incorporation, securities, antitrust, banking, intellectual property, commercial transactions, protections for foreign investors, as well as property rights and contract enforcement. These concepts constitute the “Washington Consensus” plank of market-friendly reforms actively pushed throughout the world in the 1980s and 1990s.<sup>93</sup>

Several contributing factors fueled the emphasis on the adoption of law for economic purposes. The fall of communism precipitated a clamoring (from legal sellers and legal buyers) in the 1990s for legal reforms

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88. EASTERLY, *supra* note 22, at 94.

89. See Wade Channell, *Lessons Not Learned About Legal Reform*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 137, 137–42 (Thomas Carothers ed., 2006).

90. Troope, *supra* note 57, at 393.

91. See Ganey, *supra* note 80.

92. See Robert C. Effros, *The World Bank in a Changing World: The Role of Legal Construction*, 35 INT’L LAW. 1341, 1344 (2001).

93. For an excellent account of this program and its harmful consequences see Paul H. Brietzke, *The Politics of Legal Reform*, 3 WASH. U. GLOB. STUD. L. REV. 1, 3–4 (2004).

suited to domestic and international capitalism. Publicly held economic assets (for example, utilities, factories, natural resources, and public transportation) were sold into private hands, often at low prices, to insiders or their families or friends, raising cries of unfairness or corruption, and prompting calls for better laws and legal institutions.<sup>94</sup> Some international development institutions blamed the Asian financial crisis of the late 1990s on lax financial regulation and enforcement,<sup>95</sup> prompting calls for legal reforms.<sup>96</sup>

Another reason for the turn to law was the dismal performance of a large swath of nations in sub-Saharan Africa and Central Asia—the desperate “Bottom Billion.”<sup>97</sup> While countries around the globe, led by China and India, were making dramatic economic strides, the “Bottom Billion” countries were falling further behind. Although each failure has its own complex of reasons, most countries have suffered under unstable or venal governments. Aid money given to these countries to fund economic development projects too often ended up in the overseas bank accounts of government officials or was spent on purchasing arms for the military.<sup>98</sup> Improving the legal system offered the hope that legal restraints on government and anti-corruption laws would temper this behavior.

Even countries enjoying economic improvements continue to have large numbers of poor inhabitants located in rural areas or clustered in makeshift urban housing developments (for example, in Manila, Mumbai, and Mexico City).<sup>99</sup> Residential squatters have no legal ownership rights to their abode and many of them work in the illegal (or unofficial) economy, and urban crime is rampant.<sup>100</sup> Legal rights and protection presumably would help improve their living circumstances and economic prospects.

The essential role law plays in capitalism has served as a recurring theme for more than a century, with a seminal early contribution from Max Weber.<sup>101</sup> Property rights encourage productive activity by allowing people to reap the rewards of their labor. Contract law enables people to conduct transactions at a distance over time, allowing them to reliably calculate the costs and benefits of proposed exchanges. Criminal law maintains social order, provides security, and saves people from expending

94. See JOHN NELLIS, RACHEL MENEZES & SARAH LUCAS, CTR. FOR GLOBAL DEV., *PRIVATIZATION IN LATIN AMERICA: THE RAPID RISE, RECENT FALL, AND CONTINUING PUZZLE OF A CONTENTIOUS ECONOMIC POLICY* 2 (2004).

95. See LEGAL VICE PRESIDENCY, THE WORLD BANK, *INITIATIVES IN LEGAL AND JUDICIAL REFORM* 2 (2004).

96. See DAKOLIAS, *supra* note 82, at 13–14.

97. See COLLIER, *supra* note 23.

98. See *id.* at 103.

99. See WORLD BANK, E. ASIA & PAC. REG'L OFF., *POVERTY REDUCTION & ECON. MGMT. SECTOR UNIT, PHILIPPINES GROWTH WITH EQUITY: THE REMAINING AGENDA*, viii, 3, 16 (May 3, 2000).

100. See *Development and the Environment: Living Dangerously*, THE ECONOMIST, Mar. 19, 1998; *Giving the Poor Their Rights*, TIME, July 5, 2007.

101. See David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 15 (1972).

resources to protect themselves or their property. Certainty, predictability, and security, according to these views, are essential for economic activity. The New Institutional Economics (NIE), led by Nobel Prize winning economic historian Douglass North, boosted this basic corpus of ideas in the 1990s, arguing that the development of legal institutions, particularly the protection of property, is an essential concomitant of economic development.<sup>102</sup>

A prominent voice from the South, Peruvian economist Hernando de Soto, likewise highlighted the significance of property rights in development.<sup>103</sup> In developing countries, he pointed out, a great deal of property is not officially titled or registered, titles are subject to contesting claims, and titling is a lengthy and costly process. As a consequence, individuals cannot use this property as collateral to secure loans, people are less inclined to improve their property because they fear they will lose it, and the market for property is artificially constrained.<sup>104</sup> Much of the potential wealth and capital in developing societies is thus locked up unproductively.

It would seem to be an obvious truth that law facilitates economic development. The World Bank has produced statistical studies that show a correlation between “the rule of law” and a host of development indicators.<sup>105</sup> Former World Bank President James Wolfensohn said “that the empirical evidence shows a large, significant and causal relationship between improved rule of law and income of nations, rule of law and literacy, and rule of law and reduced infant mortality.”<sup>106</sup> Pursuant to this belief, the World Bank dramatically reallocated its development funding. “Thirty years ago,” observed the Senior Vice President and General Counsel of the Bank, “the Bank had 58% of its portfolio in infrastructure, today it is reduced to 22% while human development and law and institutional reform represent 52% of our total lending.”<sup>107</sup>

There are reasons to question the wisdom of the World Bank’s funding reallocation. Although a few statistical studies have shown a positive correlation between the rule of law and economic development,<sup>108</sup> readers must

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102. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 67 (1990).

103. See HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 6 (2000).

104. *Id.*

105. See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006*, at 4 (World Bank Policy Research Working Paper Series, Paper No. 4280, 2007); THE WORLD BANK, WHERE IS THE WEALTH OF NATIONS? MEASURING CAPITAL FOR THE 21ST CENTURY 7 (prepared by Kirk Hamilton et al., 2006).

106. Press Release, The World Bank, Rule of Law Central to Fighting Poverty, Press Release No. 2002/013/S (July 9, 2001).

107. Robert Dañino, Senior Vice President & Gen. Counsel, The World Bank, *The Legal Aspects of the World Bank’s Work on Human Rights, Address at the Human Rights and Development: Towards Mutual Reinforcement Conference* 13 (Preliminary Draft, Mar. 1, 2004).

108. See Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1764-71 (2002).

consider these results with caution. The “rule of law” is not easy to measure, and often a variety of indicators are used.<sup>109</sup> In the development context, the rule of law is usually identified with property rights, contract enforcement, low crime rates, minimal corruption, independent judiciaries, legal formalism, and legal limits on government officials, while broader versions include democracy, human rights, and welfare rights.<sup>110</sup> Inconsistent, vague, or capacious uses of the rule of law notion render unclear that which is being measured. A study that compared commonly listed rule of law variables found a “relatively low level of correlation both within and across categories,”<sup>111</sup> and in some instances they were negatively correlated. These findings suggest that the factors that are measured in various studies that purport to rate “rule of law” achievement levels might actually be in tension with one another. That, in turn, raises doubts as to which factors account for the positive correlations found with economic development.

The correlations found, moreover, do not identify the underlying causal relationships.<sup>112</sup> Perhaps economic development (initially building on informal sources of security and certainty<sup>113</sup>) prompts or leads to an improvement in law;<sup>114</sup> or perhaps both economic development and the rule of law are caused by a deeper complex of underlying (unobserved) factors that explain their coincidence.<sup>115</sup> In contrast, perhaps different situations or stages of economic and legal development manifest dissimilar causal relationships. It is fantastic to assume that just one path of economic development and legal development is appropriate for all places and all times. The Western context, in which legal institutions co-evolved with advances in capitalism, is radically unlike that which developing countries face today in which countries often enter the global capitalist marketplace while nurturing legal institutions at various stages of establishment.

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109. See, e.g., MARK D. AGRAS ET AL., WORLD JUSTICE PROJECT, THE WORLD JUSTICE PROJECT RULE OF LAW INDEX: MEASURING ADHERENCE TO THE RULE OF LAW AROUND THE WORLD 6-7 (2008). For a critical study of such measures, see M.A. THOMAS, WHAT DO THE WORLDWIDE GOVERNANCE INDICATORS MEASURE? (Draft, June 2008).

110. Many commentators have commented on the variety of inconsistent ways the “rule of law” is used in the development context. See Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205, 206-209 (2008); Rachel Kleinfeld, *Competing Definitions in the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31 (Thomas Carothers ed., 2006).

111. See Haggard, MacIntyre & Tiede, *supra* note 110, at 222.

112. One of the leading producers of these studies, Daniel Kaufmann of the World Bank, acknowledges that questions about causality remain unresolved. See DANIEL KAUFMANN, RETHINKING GOVERNANCE: EMPIRICAL LESSONS CHALLENGE ORTHODOXY 17 (Draft, Mar. 11, 2003).

113. See DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH (2007).

114. As development economist Robert Solow observed, “[c]ausation almost certainly goes both ways between successful economic growth and sound institutions.” ARNOLD KLING & NICK SCHULZ, *Interview with Robert Solow*, in, FROM POVERTY TO PROSPERITY: INTANGIBLE ASSETS, HIDDEN LIABILITIES AND THE LASTING TRIUMPH OVER SCARCITY 68 (2009).

115. See Haggard, MacIntyre & Tiede, *supra* note 110, at 206-209.

Nor is it clear that positive correlations actually exist between the rule of law and economic development. A recent study of purported development variables found that, when margins of error and differences in income estimates are taken into consideration, no robust findings hold with respect to any particular growth determinants, including legal factors.<sup>116</sup> The only consensus among development economists about current economic research appears to be that “there is no consensus on ‘what works’ for growth and development.”<sup>117</sup>

Skeptics of the claim that the rule of law is essential to economic development are quick to point out that this proposition is belied by economic events. If the “rule of law” is taken to include property rights, contract enforcement, and independent courts applying the law, then the claimed connection is hard to square with the fact that the most spectacular recent examples of economic development—China especially<sup>118</sup>—did not meet these legal prerequisites.<sup>119</sup> Much of the productive property during the boom in China has been collectively owned. Networks of relations among business people can be more important to transactions than contract law. China, Korea, and Taiwan made early economic strides by ignoring intellectual property rights (reverse engineering products, selling knock offs or pirated goods).<sup>120</sup> Judicial decisions in China are subject to review by political authorities, while Korean and Taiwanese judges during their boom period were far from independent.<sup>121</sup>

A serious case can be made that Asian style neo-mercantilism and economic nationalism—which include state control of natural resources and state run investment funds, and export oriented production combined with import barriers that protect national industries<sup>122</sup>—are superior to free market capitalism for the purposes of rapid economic development, at least in initial stages.<sup>123</sup> Western nations also practiced mercantilist strategies in their early stages of economic development.<sup>124</sup> *The Growth Report*, a 2008 study issued by the World Bank, found that a common element of

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116. See ANTONIO CICCONE & MAREK JAROCINSKI, DETERMINANTS OF ECONOMIC GROWTH: WILL DATA TELL? (Sept. 2009), available at <http://www.antoniociccone.eu/wp-content/uploads/2009/10/growth-determinantsswp.pdf>.

117. Cohen & Easterly, *supra* note 28, at 1.

118. See Donald Clarke, Peter Murrell & Susan Whiting, *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION 375, 376 (Loren Brandt & Thomas C. Rawski eds., 2008).

119. See Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829 (2000); Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 75 (Thomas Carothers ed., 2006).

120. See John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219, 275 (2007).

121. *Id.*

122. See IAN BREMMER, THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS? 126–28 (2010).

123. Ohnesorge, *supra* note 120, at 225.

124. ERIK S. REINERT, HOW RICH COUNTRIES GOT RICH. . . AND WHY POOR COUNTRIES STAY POOR ch. 3 (2007).

development success stories of the last twenty-five years is a strong, development-oriented state.<sup>125</sup>

The standard recipe for economic success in contemporary global capitalism (on the first rung of the economic development ladder) is to mass-produce low cost goods for export. To attract transnational investors to supply capital and technology for production facilities, countries must offer a large, educated pool of low-wage disciplined labor, low taxes, an adequate transportation infrastructure, and protections for foreign investment.<sup>126</sup> Agreements to resolve disputes in international tribunals or in private arbitration (bypassing the national court system), as well as credible assurances from government officials that production facilities and earnings will not be expropriated, can satisfy the latter factor.<sup>127</sup> Protection against government seizure of assets, it is essential to note, is more a matter of political stability and credibility than enacted laws, which can be easily avoided. Economic Processing Zones (EPZs) have successfully attracted investment to a number of lesser-developed countries through this formula.

Countries that provide these conditions—delivering the specific types of legal support that matters for foreign corporations and investors—can undergo rapid economic development, even if the legal system as a whole fails to meet rule of law criteria. East Asia's development successes, which took place under semi-authoritarian governments, have demonstrated that "centralized systems are capable of creating a stable, predictable, and therefore credible regime for investors even if corruption is a component of the operating environment."<sup>128</sup>

These successful counter-examples expose a significant point easily obscured by the emphasis on the rule of law for development: there are limitless possible variations in informal and formal legal arrangements that can satisfy economic needs. The functions law provides for capitalist development—especially security and certainty—can, under some circumstances, be adequately filled by alternative informal or formal mechanisms.<sup>129</sup> Judiciaries that lack independence on political matters can nonetheless enjoy independence to decide economic cases in accordance with the law.<sup>130</sup> A range of substantive legal regimes can work.<sup>131</sup> Real property need not be privately held or alienable, as China has demonstrated, to be used productively for economic purposes. Although de Soto

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125. The World Bank, Comm'n on Growth & Dev., *The Growth Report: Strategies for Sustained Growth and Inclusive Development* 2 (2008).

126. See generally JEFFRY A. FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* (2006).

127. See COLLIER, *supra* note 23, at 153-54.

128. Haggard, MacIntyre & Tiede, *supra* note 110, at 212.

129. See AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATE MODES OF GOVERNANCE* (2004).

130. See Tom Ginsburg, *Judicial Independence in East Asia*, in *JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* (Randall Peerenboom ed., 2010).

131. See RODRIK, *supra* note 113; Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 *THIRD WORLD Q.* 21, 26-27 (2001).

is a tireless advocate of titling property, he acknowledges that informal forms of ownership also provide the basis for economic transactions (although less efficiently).<sup>132</sup> Empirical studies of titling projects of the type de Soto advocates, on the other hand, show mixed results—sometimes they facilitate economic activities and sometimes not.<sup>133</sup>

The variability of legal arrangements in connection with economic development is yet another iteration of the connectedness of law principle. This principle is built into NIE, which recognizes that legal institutions operate within and are supported by surrounding social and cultural complexes of norms and beliefs—economic performance is ultimately a product of this totality. NIE is frequently cited for the proposition that law is necessary for economic development, but that neglects this more fundamental point drawn out by North:

It is the admixture of formal rules, informal norms, and enforcement characteristics that shapes economic performance. While the rules may be changed overnight, the informal norms usually change only gradually. Since it is the norms that provide 'legitimacy' to a set of rules, revolutionary change is never as revolutionary as its supporters desire, and performance will be different than anticipated. And economies that adopt the formal rules of another economy will have very different performance characteristics than the first economy because of different informal norms and enforcement.<sup>134</sup>

Another important contributor to NIE, Oliver Williamson, emphasizes similarly that formal legal institutions operate within a more fundamental "social embeddedness level. This is where the norms, customs, mores, traditions, etc. are located."<sup>135</sup> The forces and influences at this more fundamental level change slowly over the course of decades in ways that elude deliberate design or manipulation.

An unsettling irony hovers over the current popularity of rule of law for development. Turning to rule of law reform to overcome failures in economic development substitutes one set of seemingly intractable problems for an even tougher set of problems. Improving the law depends upon a multitude of supportive social, cultural, political, *and* economic conditions, whereas selected improvements in economic performance can be made without a comprehensive legal system.

As indicated at the outset of this essay, discourse within "law and development" as well as development economics exhibit striking parallels. Both have traveled the same circle. Just as "law and development" practitioners and theorists admit that they have little knowledge of what works in legal development, economists acknowledge: "we know precious little

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132. Hernando de Soto, *The Mystery of Capital*, 38 FIN. & DEV. 1 (2001).

133. Davis & Trebilcock, *supra* note 131; Cross, *supra* note 108.

134. Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 366 (1994). See NORTH, *supra* note 102, wherein North emphasizes the shaping influence of surrounding social factors.

135. Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 596 (2000).



about how to make growth happen.”<sup>136</sup> The collapse of the Washington Consensus dissipated the former “confidence [among economists] that they have the correct recipe, or that privatization, stabilization, and liberalization can be implemented in similar ways in different parts of the world.”<sup>137</sup> Just as law and development specialists now advocate moving away from “cookie cutter” approaches and urge attention to context, economists too “focus on the need to get away from ‘one-size-fits all’ strategies and on context specific solutions.”<sup>138</sup> Development economists have even articulated an exact cognate of the connectedness of law principle: “what might be the single most important insight of the field of economics—that you have to be aware of the fact that everything is connected to everything else.”<sup>139</sup>

What I have coined the “connectedness of law” principle is the legal angle on what is ultimately the connectedness of society—the entirety of which includes culture, politics, economics, law, and everything else. Each thread within this totality touches every other. Pulling or cutting a thread, or adding a new set of threads, produces reactions and adjustments elsewhere (especially reactions by elite interests that strive to maintain or recover the status-quo arrangement<sup>140</sup>); endogenously and exogenously generated change continually takes place within all societies, but this process always occurs within the shaping contours of the existing fabric. There are too many scarcely visible and complexly interacting moving parts within this totality for us to deliberately engineer development in the desired ways.

## V. The Progressive Law and Development Package

A more recent stream within law and development is pushing for expansion beyond just economic development to encompass other integrated reforms as well.<sup>141</sup> Amartya Sen influentially advances a comprehensive approach to development:

The claim here is not so much that, say, legal development *causally* influences development *tout court*, but rather that development as a whole cannot be considered separately from legal development. Indeed, in this view, the overarching idea of development is a functional relation that amalgamates distinct developmental concerns respectively in economic, political, social, legal and other spheres. This is more than causal interdependence: it involves a constitutive connection in the concept of development as a

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136. Abhijit V. Banerjee, *Big Answers for Big Questions: The Presumption of Growth Policy*, in *WHAT WORKS IN DEVELOPMENT? THINKING BIG AND THINKING SMALL* 207, 209 (Jessica Cohen & William Easterly eds., 2009).

137. Dani Rodrik, *The New Development Economics: We Shall Experiment, But How Shall We Learn?*, in *WHAT WORKS IN DEVELOPMENT? THINKING BIG AND THINKING SMALL* 40 (Jessica Cohen & William Easterly eds., 2009).

138. *Id.*

139. Banerjee, *supra* note 136, at 207.

140. See NORTH, *supra* note 102, at 101.

141. See Thomas Carothers, *Rule of Law Temptations*, 33 *FLETCHER F. WORLD AFF.* 49, 49 (2009).

whole.<sup>142</sup>

Sen's vision—another articulation of the connectedness of law principle—includes equitable development (a fair distribution of wealth), an adequate social safety net, protection from violence and insecurity, democracy and political liberties, a free media, and women's rights—all in the furtherance of enhancing people's capabilities and freedom. This puts at issue the very meaning of "development," challenging the dominant assumption that it should be defined exclusively in terms of economic growth.

When the momentum of neo-liberal economic reforms receded at the turn of the twenty-first century, the World Bank tentatively broached a more expansive vision of the scope of legal reform: "The rule of law is essential to *equitable economic development and sustainable poverty reduction* . . . . *Vulnerable individuals*, including women and children, are unprotected from violence and other forms of abuse that exacerbate inequalities."<sup>143</sup> Law and development initiatives began to address a package that included "economic development, poverty reduction, democracy, human rights, due process, equity, etc."<sup>144</sup>

In contrast to the conservative cast of the law and capitalism stream discussed above, the broader law and development stream is often taken up by progressives. The previous emphasis on property rights and commercial law now shares space with attention to political, civil, and welfare rights. A conspicuous tension lurks just beneath the surface of these respective emphases. Progressive proponents of the expansive view are skeptical of the unchecked spread of global capitalism, they raise concerns about its adverse human and environmental consequences, and they doubt its fairness in the selection of winners, losers and the distributions of benefits.<sup>145</sup> Making odd bedfellows, conservatives and progressives pitch their contrasting programs and objectives under the same umbrella of "rule of law" development.

There is an element of faith and an element of opportunism in the progressive law and development package. The faith element is the belief or hope that the reform package hangs together. A mutually reinforcing circle exists, according to this faith, in which the rule of law begets democracy, which begets social welfare capitalism, which begets liberal rights, which begets women's rights. The causal arrows presumably go in all directions, each supporting the other, with the rule of law bearing substantial weight and responsibility for the whole.<sup>146</sup> This same faith was behind the eagerness of the U.S. to promote rule of law reform in China, in the optimistic hope that legal reform would naturally "seep into other

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142. Amartya Sen, *What is the Role of Legal and Judicial Reform in The Development Process?*, Address at the World Bank Legal Conference 8 (June 5, 2000).

143. Santos, *supra* note 47, at 276 (quoting THE WORLD BANK, THE WORLD BANK ANNUAL REPORT 2002, at 77).

144. DAKOLIAS, *supra* note 82, at 10.

145. See Dañino, *supra* note 107, at 12–13.

146. For a realistic articulation of the supportive interconnections see O'Donnell, *supra* note 77.

areas,”<sup>147</sup> eventually bringing greater democracy and human rights in its wake.

The opportunistic element arises when those who do not share this faith nonetheless strategically reason that their own preferred part of the package can be advanced by hitching a ride on the rule of law bandwagon. In this vein, David Trubek, a long-time law and development scholar, who is openly skeptical of the rule of law, nonetheless urges that “progressive intellectuals should engage constructively with the ROL enterprise” because it provides a vehicle to fight for progressive goals.<sup>148</sup>

The promise that developing the rule of law will bring these other goods has not been borne out by events, at least not so far. As Carothers points out, China and Russia have loudly embraced the rule of law while tightly controlling democracy and rights; and they are not alone.<sup>149</sup> “In all these countries,” he observed, “strong-hand rulers have found that the rule of law works well as an alternative objective to democratization, not one that complements it[,] but rather one that will help preserve authoritarian or semi-authoritarian rule.”<sup>150</sup> The rule of law—law setting limits on government—can be easily transposed into rule by law—law as an instrument of government rule.<sup>151</sup> A number of Latin American countries combine democratic elections, powerful executives, weak courts, and harsh legal systems.<sup>152</sup> A Latin American scholar made “the regretful observation that at times the rule of law (or at any rate the rhetoric of the rule of law) has been employed in the service of authoritarian ideologies.”<sup>153</sup>

The abiding belief in courts as the bulwark of law, liberty, democracy, and rights has suffered repeated disappointments. In an effort to promote the enactment of a criminal code in Russia that provided due process and fair trial protections for defendants, the U.S. government hosted training seminars and conferences for numerous judges and lawyers (in the “thousands”), and paid for Russian judges to come to the U.S. for seminars and dinners, hoping they would be advocates for the reform.<sup>154</sup> When the code came up for enactment, however, most judges and lawyers “were part of the chorus that opposed the reform.”<sup>155</sup> A USAID sponsored program in El Salvador to improve judicial administration and the criminal justice system “came to grief” owing to “powerful resistance to reform” from judges.<sup>156</sup>

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147. Stephenson, *supra* note 43, at 14.

148. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 74, 93–94 (David M. Trubek & Alvaro Santos eds., 2006).

149. Carothers, *supra* note 141, at 54.

150. *Id.*

151. See Stephenson, *supra* note 43. See generally BRIAN Z. TAMANAH, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 91–94 (2004).

152. See Dodson, *supra* note 78, at 219.

153. O'Donnell, *supra* note 77, at 45.

154. Matthew Spence, *The Complexity of Success in Russia*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 217, 226 (2005).

155. *Id.* at 227.

156. Dodson, *supra* note 78, at 207.

The results of reform efforts depend upon how they interact with the surrounding complex of factors—the connectedness of law principle—and this can go in any direction. It depends upon the incentives at play (who stands to gain or lose money, status, or power), the court's locus in the surrounding constellation of power, popular attitudes toward law and courts, and a host of other possible factors. There is no doubt that the rule of law, democracy, civil rights, and social welfare capitalism can exist in a mutually supporting fashion as they do in the West. Nothing inherent to the rule of law, however, leads to the replication of this arrangement in the countries that are the targets of law and development projects, which have vastly different social-cultural-economic-political-legal dynamics.

Participants in the law and development enterprise know this already. Few people familiar with actual conditions in target countries can sanguinely believe that the rule of law has the power to remake societies around the world to resemble the desired progressive vision. It is perhaps obvious, though still worth stating, that much law and development activity and talk—in both conservative and progressive variants—is ideologically driven advocacy.

## VI. The Law and Development Enterprise

The preceding analysis has examined failures on the receiving end of law and development activities. Now I will take a close look at the delivery end. As argued earlier, it is a mistake to conflate law and development with legal development. Law and development is better understood as a set of activities generated by funding entities from advanced capitalist countries.

Law and development activities ramped up in the early 1990s when the World Bank embraced rule of law building. Before this could happen, however, a major obstacle had to be overcome. A specific limitation on expenditures is written into the World Bank's Articles of Agreement (the charter that created and controls the Bank): "Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development."<sup>157</sup> A separate clause prohibits the Bank from engaging in political activities: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions[.]"<sup>158</sup> These provisions were in keeping with the purpose for which the World Bank—officially the International Bank for Reconstruction and Development—was created in the mid-1940s, amidst the wreckage left by World War II, to help finance economic recovery.<sup>159</sup>

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157. International Bank for Reconstruction and Development [IBRD], Articles of Agreement art. III, § 4(vii). The official name for the World Bank is the IBRD.

158. *Id.* art. IV, § 10.

159. See FRIEDEN, *supra* note 22, at 58-60, 69.

In the early 1990s, World Bank General Counsel Dr. Ibrahim F.I. Shihata issued a series of legal opinions that effectively re-wrote the stated limits in the Articles restricting funding to economic development projects to allow funding for rule of law projects.<sup>160</sup> He subtly accomplished this in the following passage: "Under normal circumstances, Bank loans and guarantees are to finance specific projects in the broad sense of this term, which, in my view, includes all well-defined productive purposes whether these are served directly (such as in industry and agriculture) or indirectly (such as in infrastructure, *institution building*, social services, etc.)."<sup>161</sup> The inclusion of "institution building" opened the door for legal development. World Bank money began pouring into rule of law projects.

There is a discomfiting incongruity in the fact that rule of law projects are now funded on a grand scale thanks to a de facto unannounced amendment of the Bank's "constitution" engineered by its top lawyer<sup>162</sup> (although others in the organization must have agreed with this shift). Shihata's supporters applaud his "suppleness of interpretation" as necessary to keep the Bank's activities in sync with changing times.<sup>163</sup> Yet it is dubious as a matter of fidelity to law.

Once the door was opened for rule of law reform, initially with a narrow concentration on property rights, commercial law, and judicial reform, it was gradually pushed wider to include aspects of the progressive development package. As the scope of rule of law projects expanded, with funding for economic projects regularly conditioned on acceptance of rule of law requirements, these actions push up against the Bank's explicit prohibition against interfering in the political affairs of recipient nations.

This event has been recounted not to cast aspersions on Shihata's motives, but to concretely illustrate that rule of law promotion is the result of the efforts of individuals who aggressively moved it to the center of the development agenda. Lawyers propose, organize, and carry out the projects, involving independent law and development consultants, creators and employees of NGOs, staff lawyers in development organizations, and law professors. From the standpoint of lawyers, rule of law projects are undoubtedly worthwhile. It adds to the attraction for participants that law and development work offers travel to exotic lands while engaging in good deeds. Because the projects are designed and carried out by lawyers, they naturally center on what legal professionals are familiar with—judges, lawyers, police, and legal codes. As a critic of land reform in Africa emphasized, to understand the orientation of law and development projects one must pay attention to the agency of lawyers—to "the entrepreneurial activities of legal professionals."<sup>164</sup>

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160. This account is taken from an admiring recounting by Robert C. Effros, *supra* note 92, at 1341.

161. *Id.* at 1345 (emphasis added).

162. See John K. M. Ohnesorge, *On Rule of Law Rhetoric, Economic Development, and Northeast Asia*, 25 WIS. INT'L. L.J. 301, 306 (2007).

163. Effros, *supra* note 92, at 1348.

164. AMBREENA S. MANJI, *THE POLITICS OF LAND REFORM IN AFRICA: FROM COMMUNAL TENURE TO FREE MARKETS* 82 (2006).

The bustle of rule of law projects around the world gives the appearance of a flourishing activity on the surface. But participants in this enterprise have exposed its internal flaws. "Unlike the development professionals who dominate many other areas of development aid, many Western rule-of-law aid practitioners have little or no prior experience in developing and transitional societies . . ." <sup>165</sup> It would not immediately occur to lawyers that law itself might be a part of the problem or that a more effective solution might lie elsewhere; nor would lawyers easily know where to look to find alternatives to law. "Senior judges, ambitious young lawyers, or retired police officers are often placed in positions of designing or managing projects, providing advice to local counterparts, or delivering training." <sup>166</sup> These legal missionaries often have scant awareness of how transplanted law operates, or does not operate, in radically different social and cultural contexts.

Another common flaw is that the people who carry out these projects frequently know little about local circumstances. It can take six months to a year living in a society for an outsider to acquire a feel for the social-political-cultural dynamics, building trust and relationships that will help in the implementation process. <sup>167</sup> One rule of law project coordinator revealed that "[i]n ten years of recruiting and fielding consultants . . . I have generally had to fight for permission to provide those consultants with more than two days of preparation time . . ." <sup>168</sup> "It is not surprising then that many of these consultants show up insufficiently prepared for the specific setting, though well versed in their subject matter specialty." <sup>169</sup> Routine staff rotations within donor agencies and among practitioners in the field move out people who have learned the lay of the land and formed social bonds, replacing them with people who must start all over gaining familiarity and developing relationships. <sup>170</sup>

Projects run in this fashion have severely reduced their already small chance of success from the start. One veteran practitioner highlighted this fundamental flaw:

Particularly during project development, when the very nature of the project is decided, many agencies rely on visiting consultants rather than in-country staff. This can lead to a superficial analysis of what ails a legal system and what legal issues confront the disadvantaged. To put the point mildly, a

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165. Golub, *supra* note 50, at 127. See Piron, *supra* note 51, at 295.

166. Piron, *supra* note 51, at 294.

167. My two-year sojourn in Yap bears this out. See BRIAN Z. TAMANAHA, *UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW* (1993). A cautionary tale may illustrate the point. During my tenure there, two external education consultants came to Yap for a two week visit, interviewed a number of officials (including me, in my capacity as legal advisor of the Education Department), and subsequently wrote a report outlining proposed reforms of the education system. The report was based upon an inaccurate understanding of the actual dynamics of the situation, and to my knowledge it came to nothing (although the consultants earned a handsome sum for their efforts).

168. Channell, *supra* note 89, at 150.

169. *Id.*

170. See Piron, *supra* note 51, at 295.

society seen from a hotel is far different from one experienced every day.<sup>171</sup>

Further problems are created by the ways projects are funded, designed and assigned.<sup>172</sup> Donor institutions, development agencies, or NGOs may administer co-existing programs in the same countries without coordination or sharing knowledge.<sup>173</sup> Money comes in chunks that must be spent (or revert back), preferably with something concrete to show at the end, while it is harder to obtain a continuous funding stream for projects that continue for several years.<sup>174</sup> Many projects supported by the United States through USAID are administered by private, profit seeking organizations. The process of competitive bidding for projects, with large sums at stake, discourages innovation (untried or risky plans are less likely to be selected) and promotes secrecy within the consulting community.<sup>175</sup> Requests by development agencies for additional grants from governments or funding sources are bolstered by citing past successes. One critic charged that "the tendency to claim enormous impact for legal and judicial reform projects is widespread," although the real benefits are hard to assess.<sup>176</sup> Concrete technical assistance projects—for instance, holding training seminars for lawyers or judges, computerizing court systems—are easier to check off as successfully completed at the end of the project period, even when the actual improvements in the delivery of justice achieved are minimal. One must keep in mind that "[l]egal reform is a business."<sup>177</sup>

Few people involved in law and development appear to think these projects work in any deep sense, at least not in the short term. Small improvements in institutional functioning can be achieved, but the overall inadequacies of a legal system face down these efforts like an immovable object. Recall that the frequent failure of economic development initiatives helped turn efforts towards legal development on the theory that economic development was being inhibited by a faulty legal infrastructure. However, legal development suffers the same persistent failures.

So why do rule of law projects, with their negligible results, continue to receive generous financial support? Factories have architectural plans, are built in a determinate period, and achieve commercial success or bleed money until they are shuttered. In contrast, the rule of law has no blueprint, no standard structure, no concrete or visible manifestation, and it is not something that can be constructed on demand. There is no known timetable for building the rule of law. It may take decades or generations or centuries. An assessment of the value and effectiveness of rule of law

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171. Golub, *supra* note 50, at 130.

172. For an extensive account of U.S. efforts, see Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999).

173. See Channell, *supra* note 89, at 151-56; Piron, *supra* note 51, at 296.

174. See Piron, *supra* note 51, at 295; Golub, *supra* note 50, at 129.

175. See Channell, *supra* note 89, at 151-156.

176. Troope, *supra* note 57, at 409.

177. Channell, *supra* note 89, at 153.

projects can thus be postponed indefinitely, while a continuous flow of projects are funded and carried out.

## VII. The Risks of Transplanting the Battle of Ideas

The two streams of law and development discourse discussed above—"law and capitalism" and the progressive package—reflect, and are championed by, competing conservative and liberal ideas respectively from Western capitalist societies. These "palace wars in the North," as one commentator put it, are being exported to and played out in the South.<sup>178</sup> Unfortunately, these familiar protagonists commit a serious error when they fail to attend to the untoward consequences that might result owing to underlying differences between the exporting and the receiving societies. A prominent example of such blindness from each side will be offered to make this point.

High on the agenda of law and capitalism advocates is that developing countries must title property and allow it to be freely alienable; this will enable people to borrow from banks to engage in entrepreneurial activities, using the land as collateral.<sup>179</sup> Their theory is that owners will improve property, increasing its value and leading to more economically productive uses. That is how capital is freed up in the West. Things are different elsewhere, however. Property in many societies is conceived of and controlled in a variety of ways that do not match freehold ownership by individuals. In such societies, family and clan members have various capacities to use land—to cross it, graze their animals on it, collect its fruits, till it—and others must be consulted about what happens to the land. The process of titling property will inevitably extinguish much of this because banks do not favor encumbered collateral.

But the adverse consequences are potentially much worse. In many societies, community life is anchored to, and revolves around, the land in ways that rootless Western societies have long forgotten.<sup>180</sup> Allowing the land to be taken and disposed of by banks will fundamentally disrupt social relations. In the West, if you default on the loan you lose your house; in these societies the social life of the community is upended<sup>181</sup> and the dispossessed lose their gathering place, where they live, and their source of food. Moreover, the position of women stands to be adversely affected because ownerships rights in many cultures, when forced to identify a single titular "owner," will favor men.<sup>182</sup> The distribution and uses of land will also inevitably change, accumulating in the hands of wealthy buyers, which will bring further social dislocations in its wake. Negative

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178. Garth, *supra* note 33, at 393–96.

179. See KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

180. For an example, see TAMANAH, *supra* note 167.

181. See Fitzpatrick, *supra* note 81, at 189.

182. For an account of the detriments to women from titling, see MANJI, *supra* note 164; CHRISTIAN LUND, *LOCAL POLITICS AND THE DYNAMICS OF PROPERTY IN AFRICA* 15 (2008).



consequences will also follow from titling property in the massive shanty towns, ghettos, or favelas that now crowd major urban centers around the world. Squatters who secure title will lose their abode when they default on their loans, ending up homeless or moving in with already crowded relatives; savvy buyers will collect property at foreclosure sales, increasing their holdings. One must not forget that titling to produce collateral for loans inevitably means that, when loans are not duly paid, land will be lost and redistributed.

These potential consequences must be weighed against the economic benefits that purportedly will accrue from aggressively spreading private ownership of property. An articulate advocate, Kenneth Dam, acknowledges that communal societies will undergo significant changes from titling, but he perfunctorily reports that this same transformation also occurred early in the history of the West and things worked out for the better there.<sup>183</sup> People in developing countries, many of whom do not identify with Western ways, might not find this reassuring. Dam's (mis)analogy to the evolution of property rights in the West also fails to appreciate the major implications that follow from the *non-evolutionary*, sudden introduction of fee simple title registration systems into contexts already thick with recognized customary rules about property. This transition creates a situation with multiple potentially clashing, competing rule systems,<sup>184</sup> resulting in *greater* uncertainty about property rights and the potential for opportunistic resort to these systems.<sup>185</sup>

Local inhabitants should at least be fully apprised of, and consulted on, the adverse social consequences of the campaign to title property. People must think about what kind of development they want and at what cost to their lives and community.

The radical left, on its part, likewise commits a serious mistake when carrying-over its theoretical assumptions. In the 1970s and 1980s, Critical Legal theorists from elite law schools in the United States engaged in a thoroughgoing critique of "legal liberalism." Their basic argument was that the rule of law operates under a guise of neutrality which conceals that the law maintains an unjust social order in the service of the elite.<sup>186</sup> Critical Legal theorists were especially scathing about legal formalism, which they attacked as a false claim of objective rule application, when the truth is that indeterminate legal rules allow judges substantial room to maneuver.<sup>187</sup> Judges are deluded if they reason formalistically because they possess substantial freedom in legal interpretation; they are deceptive when they hide behind formalist rule-bound reasoning to come to preferred ends while pretending that the decision was compelled by the law. Critical Legal theo-

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183. DAM, *supra* note 179, at 150-57.

184. See BRIAN Z. TAMANAHA, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2008).

185. For an example of this uncertainty, see EASTERLY, *supra* note 22 at 95-97.

186. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* ch. 6, 7 (2006).

187. Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 573 (1983).

rist David Trubek, a prominent voice in law and development for decades, and others, have carried this skepticism about and antagonism toward legal formalism into the law and development context.<sup>188</sup>

Again, this overlooks a crucial difference. While it is healthy to expose the exaggerations of legal formalism in Western legal systems where the legal systems are well-entrenched, it is an entirely different matter to export skepticism about legal formalism to societies in which law barely functions. Skeptical views of legal formalism can prevent a legal system from getting off the ground. A legal system cannot work if the very notion that legal officials are rule-bound is perceived to be a fraud. In the absence of any legal restraints, power has its way, and the powerless mass of people in developing countries will have little protection.

In both forgoing examples, from the right and the left respectively, theoretical ideas that grew up within Western contexts have very different implications when brought over and played out in development contexts. That is what the connectedness of law principle advises, and anyone who fails to consider this will provoke unanticipated and undesired consequences.

### VIII. "Law and Development" is Not Legal Development

At the outset of this essay I asserted that it is best not to see "law and development" as a "field," but instead as a label we attach to a host of projects funded and carried out by an array of development organizations aimed at countries that are tagged as insufficiently advanced capitalist economies or lacking features of liberal democracies. "Legal development," I argued, is not the same as "law and development"—which the coincident phraseology tends to obscure. To perceive this more easily, imagine, if you will, how things would look if all current law and development projects around the world were to cease—immediately.

In core respects very little would change. Legal institutions in all of these countries would continue what they are doing. Legal actors would go about their business of constructing the law on an ongoing basis. These legal systems would suffer from manifold flaws (as do all legal systems). Actors within these societies—government, businesses, organizations, and individuals—would continue to interact with the legal system in the usual ways they do (invoking it, avoiding it, adhering to it, trying to control it, or using it to their advantage). Legal actors and non-legal actors would push and prod the legal system in connection with demands that emerge within society. This is the ongoing process of legal development that takes place in every organized society that has, at least, a minimally functioning legal system.

That is not to say that no consequences will follow from the termination of law and development projects. Money that now goes into these projects—several billion dollars since 1990—would disappear, along with

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188. For a recent example of this skepticism, see Trubek, *supra* note 148.

the widely dispersed small army of law and development practitioners. When divided up by country over time, this apparently large sum is less impressive. For large countries, taking away this money will have hardly any impact on the daily functioning of the system. For small or very poor countries, the financial loss would be felt, but the consequences of this loss depend upon what law and development money was being spent on. Development organizations from donor countries take a sizable chunk of the money to fund their own operations—money that recipient countries never see. Salaries of legal officials are rarely covered by law and development funding, so the legal systems in recipient countries would continue to operate as before; but certain costly technical projects, like computerization, would not. There will be fewer judicial training seminars run by outsiders, fewer conferences, and fewer trips abroad for local officials.

Some of the projects that now take place through law and development would likely still be proposed. Many of the same reformist ideas circulate in every society today (promoted by activists, elites, economic actors, lawyers committed to legal reform, etc.). Corrupt or poorly functioning legal systems are universally lamented. Businesses and local communities need reliable and timely ways to resolve their disputes. The rights of laborers and women are issues facing every society. Attempts to address these problems will continue, though the amount of money backing it will diminish.

However, it is also likely that a different set of legal development projects would emerge than the projects now promoted through law and development, and the projects would almost certainly take a different form. Without enjoying an artificial boost from money and pressure from the outside, legal development projects must marshal sufficient local support from influential players to prevail in local socio-political contests over reform. Local agendas and priorities would be pursued. The projects would be designed, run, and implemented by people who understand the situation, who know what is possible and understand what compromises must be made, and who have long term relationships—social and political capital—to draw on in the course of implementation. None of this assures the success of legal development initiatives because legal development in every country is uneven—but this consummately local process of legal reform avoids several of the key flaws that now plague law and development projects.

One implication of this thought experiment is that the failures of law and development projects in the past five decades does not entail that legal development is failing. Rather, it means that law and development projects—mostly related to the establishment of capitalist, democratic, and liberal legal institutions—are not showing much success. Legal development still takes place, although not according to, or in compliance with, this formula.

China, for example, is regularly cited as a failure in law and development literature for not establishing independent courts, for corruption, for the harassment of activist lawyers, and for continued Party control over the

judiciary.<sup>189</sup> Yet in the past twenty-five years many new laws have been passed, the number of cases handled by the Chinese court system has increased tenfold, a national code is being prepared, a master's degree in law is virtually required for a senior judicial position, the number of lawyers in private practice has gone from zero (previously all lawyers were employees of the state) to 118,000 licensed lawyers in 12,000 firms, and now more than 150,000 suits are filed annually *against* the government.<sup>190</sup> That is substantial legal development<sup>191</sup>—none of which can be directly attributed to law and development projects.

A similar, albeit less optimistic, observation can be made about Russia, also frequently pegged as a failure. Corruption and political interference are widely thought to be endemic in Russian courts<sup>192</sup>; yet, the number of civil cases handled by courts has more than doubled in the past decade, showing that the Russian people resort to the courts in increasing numbers.<sup>193</sup> Russian citizens apparently draw a distinction between “[cases] involving ordinary citizens,” in which they expect the court to render a fair disposition, and “[cases] involving the state and/or individuals or entities with disproportionate power,” which are prime targets for corruption and political influence.<sup>194</sup> This too represents real legal development.

This thought experiment helps expose that law and development projects are interventions in a legal system from the outside. This observation is not itself a reason for condemnation—many of these initiatives are well intentioned and might have positive consequences for the receiving society, *if* they worked. This observation merely highlights a crucial fact that conditions their operation and diminishes their likelihood of success. External interventions into any society face additional barriers that internally produced initiatives do not. Law poses a particular challenge for external initiatives because law is imbricated within a thick complex of internally evolved normative orderings, power bases, and incentives that can be nearly imperceptible from the outside.<sup>195</sup>

Finally, this thought experiment makes clear that while law and development projects are uniformly presented as being *for* the benefit of recipient countries and their people, they are often not *by* or *of* recipient countries and their people. Lurking in the background of the law and development enterprise is the fact that many of these legal initiatives are

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189. See John L. Thornton, *Long Time Coming: The Prospects for Democracy in China*, 87 FOREIGN AFF. 2, 10-13 (2008).

190. *Id.* at 10-11.

191. For more evidence of legal development, see RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002).

192. Kathryn Hendley, 'Telephone law' and the 'Rule of Law': The Russian Case, 1 HAGUE J. RULE L. 241, 248-57 (2009).

193. *Id.* at 243.

194. *Id.* at 253.

195. An overview of this can be found in TAMANAHA, *supra* note 59. One of the best studies of the barriers that law must confront is SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978).

not consensual, but are imposed in the form of conditions that must be met by recipient countries to secure loans from international funding institutions<sup>196</sup> or that are pressed by outsider activist NGOs that claim to speak for the people.<sup>197</sup> Rule of law initiatives are dominated by the agendas and ideological views (including modernization assumptions) of the promoters on the delivery side—whether transnational corporations or investors seeking legal protections, or selfless advocates of human rights—more than they are about finding concrete ways to serve the pressing needs of the receiving populace.

## IX. Moving Forward

Legal development tends to be more complex and challenging in developing contexts for four reasons in particular. Many of these societies must grapple with the conflicts and tensions created by the presence of competing and overlapping cultural, ethnic, religious, and legal orders.<sup>198</sup> In many of these societies, significant portions of the law have been transplanted from elsewhere and, thus, are unfamiliar to, clash with, or are distant from the social life and understandings of the populace.<sup>199</sup> Their legal systems are often weakly institutionalized and have limited power, especially outside of urban areas. Moreover, in a number of countries, the government (including officials, legislators, and members of the judiciary) is under the grip of a cabal or is fraught with corruption and entrenched interests which benefit from the status quo. Hence legal reform projects are typically run through, or are administered by (or require the cooperation of), the very officials who stand to lose if the reforms are effective.<sup>200</sup>

Despite the largely negative tenor of this essay, which is the product of the focus herein on the failures of law and development efforts, it must be emphasized that the message of this essay is *not* to turn away from legal development. Every society in the world today requires an effective legal system that can, at a minimum, manage and support the activities of governmental and economic systems. The great benefit of the rule of law, furthermore, is in erecting legal restraints on the government—and an effective state legal system can deliver this type of restraint.<sup>201</sup> For these reasons, law must develop and every effort should be made to help legal institutions develop in positive ways, with the awareness that this is a unceasing project. It will help to keep in mind that legal development is not about developing the “rule of law” as such. Legal development is a retail enterprise—it is about getting legal institutions to adequately deliver basic services to meet legal demands.

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196. See EASTERLY, *supra* note 22 at 146.

197. See Kenneth Anderson & David Rieff, “Global Civil Society”: A Sceptical View, in GLOBAL CIVIL SOCIETY 2004/5 (2005).

198. See generally Tamanaha, *supra* note 184.

199. See TAMANAH, *supra* note 59, ch. 5.

200. See EASTERLY, *supra* note 22, ch. 4.

201. See TAMANAH, *supra* note 151, ch. 11.

Above all else, it is essential in law and development to be clear about the specific objective at hand, and then ask what might best work to achieve the objective. Let us assume, for instance, that the goal is to increase overall societal wealth by producing goods for export in global markets. Relying upon historical, theoretical, and statistical knowledge about law and capitalism can be misleading. Even if it is true that property rights are historically associated with the growth of capitalism and that studies show a positive correlation between property rights and economic development, it does not necessarily follow that the best strategy to advance the goal of economic development in a given country is to build the legal system. If the state legal system is caught in a constellation of forces—a structural trap that relentlessly defangs legal reform efforts—then the best strategy might well be to circumvent the state legal system and find, or create, other institutional arrangements that facilitate economic activities. It might turn out that as the economic performance of a given country increases, the legal system will also gradually improve—perhaps because a larger pool of educated people develops, the middle class expands and demands better essential legal services, adequate funding becomes available to support legal institutions, or economic incentives reward, and hence encourage, a more reliable and efficient legal system. None of this is guaranteed, of course. What happens is always a product of the mixture of surrounding factors, but this reverse or concurrent causation is as plausible as current claims that improving the law will improve economic performance.<sup>202</sup>

A nagging discrepancy dogs the present emphasis on the rule of law for economic development. Developing countries need economic development *now*. There is general agreement, however, that establishing the rule of law is a long-term project which no one knows how to accomplish. Meanwhile, recent experience confirms that explosive economic progress can occur in the absence of the rule of law.

It is hard to identify even a single example of the rule of law coming to prevail in a society through the *deliberate* implementation of policies aimed at developing the rule of law. Talk about the rule of law in the development context—in particular the assumptions that it is a particular institutional arrangement that can be reproduced or encapsulated and measured by “rule of law indices”—glosses over a host of contestable issues. The rule of law is an ideal that does not mean any single thing.<sup>203</sup> No two realizations of the rule of law ideal are alike. No two sets of institutional arrangements are alike or function in the same way. The rule of law in Japan is not like the rule of law in the United States, which is not like the rule of law in France, and so on. Standard institutional arrangements are shells filled in and given shape and form by surrounding cultural, economic, political and legal circumstances.

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202. Development economist Robert Solow asserts that “Causation almost certainly goes both ways between successful economic growth and sound [legal] institutions.” KLING & SCHULZ, *supra* note 114, at 68.

203. See TAMANAH, *supra* note 151.

Let us assume, secondly, that the goals (apart from producing steady economic growth) are to build a democratic polity, protect civil rights, create safe working conditions, have a fair and equitable distribution of wealth, engage in environmentally sensitive development, and empower women—the progressive law agenda. There is little reason to think that any of these goals will be advanced by judicial reform projects or strengthening the rule of law. Law within a given society may cut against any, or all of, these goals; nor should one assume that judges will be sympathetic to their advancement. Far-reaching economic, political, and cultural transformations must occur in these countries for this progressive plank to become a reality. These goals can be better advanced if activists work directly on behalf of each objective rather than pinning their hopes on the magical power of the rule of law (opportunists who cloak their agenda under the rule of law mantle already act on this recognition).

Let us assume, finally, that the goal is to provide the populace with effective dispute resolution fora. That is often thought to be *the* essential role of courts. Recall, however, that even in the West, private arbitration or mediation handle a substantial proportion of disputes. In many developing contexts, courts and law are deeply problematic for all the reasons described earlier. It might make sense, therefore, to invest resources in existing alternatives or to create new community tribunals where none exist. More than 80% of people in developing countries already take their disputes to non-state tribunals, so supporting such alternatives will merely be catching up to reality. In response to these actions, state legal institutions faced with a potential rival for resources and prestige might even be prompted to improve their functioning, or state and non-state tribunals might, over time, merge or interact in a complementary fashion.

The penchant of many legally trained development practitioners and academics to assume that state law and state courts are the solution to the problems faced by these countries is the product of ingrained beliefs about the state having a monopoly over law. In situations where the state legal system fails to deliver basic services and attempts to reform the system persistently fail, the solution must be found elsewhere. Just as functional alternatives to law may satisfy the requirements of economic development, functional alternatives to law may be available to resolve disputes, maintain order, and coordinate behavior. Customs and customary law; religious norms and bodies; and community or informal norms and tribunals do a great deal of this work in many settings around the world.<sup>204</sup> The pride of place that law jealously claims should not be a bar to finding workable solutions to social problems, even if that means stepping around existing state legal institutions.

The latest wave of law and development work has already turned to explore social alternatives to law.<sup>205</sup> This too is not a panacea, it must be

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204. See CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES (Deborah H. Isser ed., forthcoming 2011).

205. See World Bank Indon. Soc. Dev. Unit, *supra* note 85; Fitzpatrick, *supra* note 81; Dolores A. Donovan & Getachew Assefa, *Homicide in Ethiopia: Human Rights, Federal-*

said. Some of these alternatives will be corrupt or oppressive, will be controlled by local power holders, will impose draconian punishments, or will enforce cultural or religious inequalities (caste systems, and denigration of women).<sup>206</sup> With these large caveats, non-state alternatives that function in ways that meet the needs and values of the community can provide an essential service to people who are now ill-served by state legal systems.

These comments draw out once again why “law and development” is misleading: the very label suggests that law, or the “rule of law,” has a special ability to deliver desired development goals. That faith is bound to disappoint. Law cannot deliver in and of itself because it swims in the social sea with everything else.

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ism, and Legal Pluralism, 51 AM. J. COMP. L. 505 (2003); Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 203 (David M. Trubek & Alvaro Santos eds., 2006).

206. See Donovan & Assefa, *supra* note 205.



